No. 3771

United States Circuit Court of Appeals

For the Ninth Circuit

MARTHA M. JACKSON, Executrix of the Last Will and Testament of ELMER B. JACKSON, Deceased,

Plaintiff in Error,

vs.

SUNLIT FRUIT COMPANY, a Corporation,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

By A. H. HEWITT and M. M. GETZ

Filed this ..... day of February, A. D., 1922

FRANK D. MONCKTON, Clerk.

By ....., Deputy Clerk.

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Brief Of Plaintiff In Error

STATEMENT OF FACTS.

On the 16th day of February, 1917, one E. B. Jackson, who was the husband of Martha M. Jackson, entered into two certain contracts with the plaintiff for the sale of peaches to be grown on lands in Sutter County, California. These contracts are set forth in the Transcript at pages eight and eleven, respectively, and are designated

as "Exhibit A" and "Exhibit B," respectively. The agreements covered the crops produced on the orchards for a period of ten years. These orchards are designated as the Bogue and Oswald properties. The Bogue orchard consisted of about seven acres of land, all of which was the separate property of Martha M. Jackson, the deed therefor standing of record in her name, and the Oswald orchard consisted of twenty acres of land, which was the community property of said Jackson and wife. These contracts were made by said Jackson without the consent or knowledge of his wife. The fruit produced on said lands in the year 1917, the year the contract was made, was delivered to plaintiff, but delivery for the year 1918 was refused by Jackson and wife, and this action was commenced on September, 1918, in the District Court for the Northern District of California for damages alleged to have been suffered by plaintiff for breach of said contracts. In December, 1918, the original defendant, Elmer B. Jackson, died a resident of Sutter County, California, and his last will was admitted to probate in the Superior Court of said County, Martha M. Jackson being appointed the executrix thereof. On February 20, 1919, an order was made by the trial court herein, substituting Martha M. Jackson as defendant in place of Elmer B. Jackson, deceased, and the action was thereafter continued against Martha M. Jackson, as executrix of the last will and testament of Elmer B. Jackson, deceased, upon supplemental pleadings.

The trial of the action was commenced on October 19, 1920, and was continued from time to

time and finally submitted to the court for decision, and on January 13, 1921, the court made its findings and judgment in accordance therewith was entered by the court in favor of plaintiff and against the defendant, Martha M. Jackson, as administratrix of the estate of Elmer B. Jackson, deceased, for the sum of $44,707.18 and costs, taxed at $159.75.

Specifications of Error Relied Upon

The following errors will be relied upon by the plaintiff in error, viz:

I.

The Court erred in overruling the objection of the defendant to the question propounded by the plaintiff to the witness Laney in these words: As a result of that conversation, or at that conversation, did Mr. Jackson and you sign any papers, which objection was as follows:

"Mr. HEWITT.—We object to that as immaterial, irrevelant and incompetent, especially under the provisions of subdivision 3 of section 1880, the testimony is inadmissible, as under that section the statement of conversations that took place prior to the death of the deceased are not admissible when testified to by an assignee of the party or the party."

The objection was overruled and defendant duly excepted. Exception No. 1 (Trans. 109).

The answer to the question was in substance as follows:

We signed these two contracts. These little memoranda. At the bottom of that I see written:

"Sunlit Fruit Co. by F. E. Laney and E. B. Jackson." There are two copies. Mr. E. B. Jackson signed the little yellow slip, which is entitled, "Fruit Contract, Sunlit Fruit Company."

II.

The Court erred in overruling the objection of defendant to the question propounded by the plaintiff of the witness Laney in these words: "Q. Now, did you have any conversation with Mr. Jackson as to sending him any typewritten contract?" which objection was as follows:

"MR. HEWITT—We object to that as immaterial, irrelevant and incompetent, and as coming expressly within the prohibitory provisions of subdivision 3 of section 1880 of the Code of Civil Procedure of this State which reads as follows:

"Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

The objection was overruled and defendant duly excepted. Exception No. 2 (Trans. 110.)

The answer to the question was in substance as follows:

I had such a conversation. I told him that later on I would send him copies in more convenient form.

III.

The Court erred in overruling the objection of

defendant to the offer and reception in evidence of Plaintiff's Exhibit 5, which exhibit is in the words and figures following:

"FRUIT CONTRACT—TERM 1917 to 1927.

This contract made at Yuba City, State of California, this 16th day of February, 1917, between E. B. Jackson of Yuba City, County of Sutter, State of California, hereinafter called 'Seller,' and Sunlit Fruit Company, a corporation having its main office at San Francisco, California, hereinafter called 'Buyer.'

WITNESSETH:

The 'Seller' has agreed to sell to the buyer and the 'Buyer' has agreed to buy from the 'Seller' for the period of Ten (10) years from 1917 to 1926, inclusive, all subject to the conditions as hereinafter set forth, the following named fruits now growing and to be grown during the years and seasons covered by period aforesaid upon the orchards and lands of 'Seller' in the County of Sutter, State of California, to-wit: Nineteen (19) acres near Oswald.

All to be delivered to *'Seller'* in picking boxes as rapidly as same may ripen at Oswald Station

Trees	Variety of Fruits.	Price per Ton at Oswald Station.	Inches Dia.
900	Phillips Cling Peaches	$25.00	2¼
1053	Walton Cling Peaches	$25.00	2¼

No. 2 Fruit half price; buyer to furnish boxes and pay freight.

CONDITIONS: (98)

1. 'Seller' agrees to deliver all of said fruits in good condition for canning, free from worms, split pits, scales, fungus or other imperfections,

and of such degree of maturity as 'Buyer' may desire.

2. 'Buyer' agrees to accept all fruits contracted for that comply with the conditions herein named, paying for same, on demand, at any time after three days from time of receipt at Factory, except that no payment shall be made on any Saturday, nor during any but business hours.

3. When the entire crop of any variety is to be delivered under this contract 'Buyer' has the right to buy any fruits of that variety grown on the premises named, not of grade or quality herein named, at the market price thereof, or at 'Buyer's' option, at the prices specified above for fruits of that variety of grade or quality herein named.

4. In case of destruction of fruit by frost, flood or other similar casualty, 'Seller' is hereby released as to fruit not grown. In case of fire, strikes or other casualties affecting in any way the conduct of 'Buyer' business or canning operation, 'Buyer' is also hereby released from any and all liability hereunder.

5. No goods to be received at factory between 12 M. Saturday and 7 A. M. the following Monday, except by special agreement in each case.

6. All erasures or interlineations must be approved by the San Francisco office of the 'Buyer.'

7. It is mutually agreed between the parties hereto that the covenants herein contained shall go with the land hereinabove described and shall bind both the parties hereto, their heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF, on the day and year first above written, the 'Seller' and the 'Buyer' have each executed this contract.

E. B. JACKSON, (Seller).
SUNLIT FRUIT COMPANY,
By F. E. LANEY, (Buyer)."

The objection to the admission in evidence of this document was as follows:

Mr. HEWITT.—We object to the offer on the ground it is immaterial, irrelevant and incompetent, and particularly that no foundation has been laid for its introduction, it being a contract necessarily, under the pleadings in this case, that has to be in writing; the authorization of the party who made the contract on the part of the corporation necessarily had to be in writing also. pursuant to subdivisions 1 and 4 of section 1624 of the Civil Code. "What contracts must be in writing. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writng and subscribed by the party to be charged, or by his agent. An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will. An agreement for the sale of goods, chattels or things in action at a price not less than $200." I will get the section in a moment stating that the authorization of an agent must be in writing, where the contract itself is required to be in writing. There is no evidence yet before this court at this court at this time showing that this party was ever authorized to make the contract.

The objection was overruled and defendant duly excepted, and the document was received in evidence. (100) Exception No. 3 (Trans. 113).

The testimony relating to this document in evidence was substantially as follows:

"MR. LANEY.—I know the signature at the bottom of that document marked for identification Plaintiff's Exhibit 5. It is E. B. Jackson's writing, or Elmer B. Jackson. I see Sunlit Fruit Company, by F. E. Laney, Buyer. I wrote F. E. Laney. At the time these contracts were signed, so far as I know, I did not have any written authority to sign the contracts."

IV.

The Court erred in overruling the objection of defendant to the offer and reception in evidence of Plaintiff's Exhibit 6, which exhibit is in the words and figures, following:

"This contract made at Yuba City, State of California, this 16th day of February, 1917, between E. B. Jackson of Yuba City, County of Sutter, State of California, hereinafter called 'Seller' and Sunlit Fruit Company, a corporation having its main office at San Francisco, California, hereinafter called 'Buyer.'

WITNESSETH:

The 'Seller' has agreed to sell to the 'Buyer' and the 'Buyer' has agreed to buy from the 'Seller' for the period of Ten (10) years from 1917 to 1927, inclusive, all subject to the conditions as hereinafter set forth, the following named fruits now growing and to be grown during the years and seasons covered by period aforesaid upon the

orchards and lands of 'Seller' in the County of Sutter, State of California, to-wit: Seven (7) Acres Bogue Station.

All to be delivered to *'Seller'* in picking boxes as rapidly as same may ripen at Bogue Station. (101)

Trees	Variety of Fruits.	Price per Ton at Bogue Station.	Inches Dia.
479	Tuscan Cling Peaches	$27.50	2¼
192	Phillips Cling Peaches	$25.00	2¼

No 2 fruit half price; buyer to furnish boxes and pay freight.

CONDITIONS:

(1) 'Seller' agrees to deliver all of said fruits in good condition for canning, free from worms, split pits, scales, fungus or other imperfections. and of such degree of maturity as 'Buyer' may desire.

(2) 'Buyer' agrees to accept all fruits contracted for that comply with the conditions herein named, paying for same, on demand, at any time after three days from time of receipt at factory, except that no payment shall be made on any Saturday, nor during any but business hours.

(3) When the entire crop of any variety is to be delivered under this contract 'Buyer' has the right to buy any fruits of that variety grown on the premises named, not of grade or quality herein named, at the market price thereof, or at buyer's option, at the prices specified above for fruits of that variety of grade or quality herein named.

(4) In case of destruction of fruits by frost. flood or other similar casualty, 'Seller' is hereby released as to fruits not grown.

In case of fire, strikes or other casualties affecting in any way the conduct of 'Buyer's ' business or canning operations, 'Buyer' is also hereby released from any and all liability hereunder.

(5) No goods to be received at factory between 12 M. Saturday, (102) and 7 A. M. the following Monday, except by special agreement in each case.

(6) All erasures or interlineations must be approved by the San Francisco office of the 'Buyer.'

(7) It is mutually agreed between the parties hereto that the covenants herein contained shall go with the land hereinabove described and shall bind both the parties hereto, their heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF, on the day and year first above written, the 'Seller' and the 'Buyer' have each executed this contract.

E. B. JACKSON (Seller).

SUNLIT FRUIT COMPANY,

By F. E. LANEY, (Buyer)."

The objection to the admission in evidence of this document was as follows:

MR. HEWITT.—We object to the offer on the ground it is immaterial, irrelevant and incompetent, and particularly that no foundation has been laid for its introduction, it being a contract necessarily, under the pleadings in this case, that has to be be in writing; the authorization of the party who made the contract on the part of the corporation necessarily to be in writing also, pursuant to subdivisions 1 and 4 of section 1624 of the Civil Code. "What contracts must be in writing. The following contracts are

invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent. An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will. An agreement for the sale of goods, chattels or things in action at a price not less than $200." I will get the section in a moment stating that the authorization of an agent must be in writing, where (103) the contract itself is required to be in writing. There is no evidence yet before this Court at this Court at this time showing that this party was ever authorized to make the contract.

The objection was overruled and defendant duly excepted, and the document was received in evidence. Exception No. 4 (Trans. 116).

The testimony relating to this document in evidence was substantially as follows:

"MR. LANEY—I know the signature at the bottom of that document marked for identification Plaintiff's Exhibit 6. It is E. B. Jackson's writing, or Elmer B. Jackson. I see Sunlit Fruit Company, by F. E. Laney. I wrote F. E. Laney. At the time these contracts were signed so far as I know I did not have any written authority to sign the contracts."

V.

The Court erred in overruling the objection of defendant to the question propounded by the plaintiff of the witness Laney in these words:

"Q. Where did you get that information?"

The objection to this testimony was made as follows:

MR. HEWITT.—We object to that as immaterial, irrelevant and incompetent, and as being within the prohibitory provisions of subdivision 3 of the section of the code referred to.

The objection was overruled and defendant duly excepted. Exception No. 5 (Trans. 117).

The answer to the question and similar questions was as follows:

Mr. LANEY.—I wrote on the yellow slip 479 Tuscans and 192 Phillips. I got that information from Mr. Jackson at the same conversation. On Plaintiff's Exhibit 3 I wrote in ink 19 acres near Oswald, trees 900 Phillips, 1053 Walton Clings, and I got that information from Mr. Jackson, Elmer B. Jackson. (104)

VI.

The Court erred in sustaining the objection of the plaintiff to the questions asked by the defendant of the witness, Henry Schroeder, as follows:

"Q. Have you any knowledge of the Canners Association throughout this State, advancing the price of peaches over the 1917 or Twenty-five Dollar Contracts?"

Mr. SELBY.—I object to the question on the ground that it is clearly immaterial.

The COURT.—It is clearly immaterial. Exception No. 6 (Trans. 118).

VII.

During the trial and as a part of the case of defendant the following offer of testimony on

the part of defendant was made to the Court:

"Mr. HEWITT.—Now, if your Honor please, I never like to keep going over the same ground, but yesterday the Court ruled that the question of showing that the canners in that section voluntarily advanced the price of peaches from $25 up, owing to war conditions, etc., was inadmissible. I have three witnesses here that I brought here particularly for the purpose of showing that all of the canneries purchasing fruit in that vicinity, voluntarily, through the influence of the Food Administration, (92) advanced the price—I mean as to those that had ten-year contracts—from $25 and $35 up to as high as $85, including this plaintiff in this action, but I do not care to prove or try to prove that, if the Court is still of the opinion that testimony of that nature is inadmissible.

The Court—I do not understand that it would be admissible unless you were able to show that the plaintiff voluntarily advanced the price to Jackson beyond that which it agreed to pay to Jackson under the contract, and the fact that they may have voluntarily advanced the price to somebody else would not affect the contract price of the parties to this litigation, and for that reason I thought the evidence was incompetent.

Mr. Hewitt.—Well, of course, under the situation here, I could not show that they offered to pay an advanced price to Jackson, but it would only be an assumption that they would treat him the same as the others. If that is still the ruling of the Court, we rest.

The COURT.—Yes, that is the ruling of the Court. Exception No. 7 (Trans. 104).

ARGUMENTS

The plaintiff in error assigns ten errors upon which she contends that the judgment should be reversed. These assignments will be found in the Transcript, beginning at page 108. These assignments of error will be discussed separately in the order in which they are assigned.

ERROR NUMBER ONE.

Section 1880 of the Civil Code of California provides:

"Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

The courts of this State have in numerous cases construed the language of the section above quoted.

In the case of *Rose* v. *Southern Trust Co.,* 178 Cal. 580, the appellant sought to introduce a portion of the transcribed testimony of one Moores, who was an original party to the action. The respondent was substituted in the place of the original plaintiff, she having deceased. In reviewing the question the court said:

"It is not necessary, however, to discuss this subject at length, as we are persuaded that, in view of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure neither the testimony of Mrs. Rose, given at the former trial, nor her deposition, which was also offered, was admissible."

In the case of *Tippo* v. *Landus,* 182 Cal. 771, an attempt was made to show the correctness of a book account by the testimony of the plaintiff in the action and in that case the court said:

"In the foregoing discussion we have mentioned evidence given by the plaintiff as a witness in his own behalf. He was, however, an incompetent witness either to establish the correctness of the account, or to testify with reference 'to any matter or fact occurring before the death of' T. R. Landers. (*Code of Civ. Proc.,* sec. 1880, Subd. 3). In *Roche* v. *Ware,* 71 Cal. 375, (60 Am. Rep. 539, 12 Pac. 284), it was stated that plaintiff in an action against an executor could testify with reference to the keeping of books and their correctness. This statement as to the right to testify as to the correctness of the book was criticised in the later case of *Stuart* v. *Lord,* 138 Cal. 672, (72 Pac. 142), and shown to be dicta. In *Colburn* v. *Parrett, supra,* it was held by the district court of appeals, second district, that in such a case the plaintiff could not testify that the entries were true and correct. We agree with this decision. An examination of the record satisfies us that the defendant did not waive her objection to the incompetence of the plaintiff as a witness, and that his testimony as to all the items and transactions should be therefore ignored by us in determining whether or not the plaintiff has shown any right of recovery against the defendant. (*Code Civ. Proc.,* sec. 1880, subd. 3). Omitting the incompetent evidence improperly admitted, the judgment of nonsuit on the general ground of failure of proof was properly granted. (*Carter* v. *Canty,* 181 Cal. 749, 186 Pac. 346.)"

"An action by an administrator of one decedent against representatives of another deceased person held to be one to establish a claim against

the estate, and not one to procure relief appertaining to a trust fund, so that the plaintiff administrator, under Code Civ. Proc. sec. 1880, subd. 3, was not entitled to testify as to any matter or fact occurring before the death of such deceased person."

Roncelli v. *Fugazi,* 186 Pac. Rep. 373.

"In an action against an administrator, where deceased's signature to a letter, admitting an absolute deed to be a mortgage, was disputed, it was error, under Code Civ. Proc., sec. 1880, to permit plaintiff to testify that the signature to the letter was that of deceased."

Palmer v. *Guaranty Trust and Savings Bank,* 188 Pac. 302.

The testimony to which plaintiff in error objected was given by the witness Laney, who had been the superintendent of the defendant in error for twelve years, and will be found at page 86 of the transcript, together with the objections to its admissibility made by the administratrix.

An examination of this testimony will show clearly that it related to matters of fact occurring before the death of Jackson and that it was inadmissible under the section of the Code of Civil Procedure above quoted as construed by the courts of this State.

It was admitted on the theory that Laney was not a party to the action. True, he was not personally a party to the action, and no officer or agent of the corporation was such party. The testimony, however, was given by the corporation. No corporation can act except through its officers and agents and no rule can be invoked in behalf of a corporation that can not be invoked

by an individual. To hold otherwise would give a corporation an advantage over an individual and would deny individuals equal protection of the laws. Seemingly it must be held that the section of the Civil Code above quoted applies to the officers and agents of a corporation, for a corporation can act only through its officers and agents.

ERROR NUMBER TWO.

The same argument as to the matters involved under this assignment may be made as under assignment number one. The testimony of the corporation which was the subject of the objection made by the plaintiff in error will be found at page 87 of the transcript. It all relates to questions of fact occurring prior to the death of Jackson.

ERROR NUMBER THREE.

The question raised by plaintiff in error under this assignment went to the admissibility in evidence of the contract made by Laney and Jackson Plaintiff's Exhibit No. 5.

A copy of this contract will be found at page 89 of the transcript. When it was offered in evidence the plaintiff in error objected to its introduction on general grounds and on the special ground that no foundation had been laid, and that it being a contract required to be in writing the authorization of the party who executed the contract on behalf of the corporation was required to be in writing pursuant to subdivisions one and four of section 1624 of the Civil Code of the State of California, and, also, the further ob-

jection was made that the contract did not bear the seal of the corporation.

The contract was one that the law required to be in writing.

Section 1624 of the Civil Code of California, reads as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:

"1. An agreement that by its terms is not to be performed within a year from the making thereof;

* * * * * * * * * /

"4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or received part of such goods and chattels or the evidences, or some of them, of such things in action, or pays at the time some part of the purchase money; but when a sale is made at auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum."

The contract being one required to be in writing, the authority to execute it on the part of the plaintiff was required to be in writing.

Section 2309 of the Civil Code reads as follows:

"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

The Court will note that all the contract plaintiff's exhibit five, is signed as follows:

E. B. JACKSON,
SUNLIT FRUIT COMPANY (Seller)
By F. E. Laney (Buyer).

There was no evidence offered to show that Laney had been authorized on the part of the corporation to make the contracts in question, and when the writing was offered in evidence, the defendant objected to their admittance on general grounds and on the special ground that no written authorization had been shown, the ruling on the objection being reserved.

"The president or acting president of an insolvent bank has no authority, by virtue of his office merely, to retain special counsel in addition to the attorneys of the bank regularly employed to assist in litigation for the bank, without the sanction or ratification of the board of directors."

Pacific Bank v. *Sonte,* 121 Cal. 202.

"Where the only authority upon which the president and secretary of a corporation acted in executing a note and mortgage in its name was a resolution passed at the preliminary meeting of stockholders before organization of the board of directors, such authorization is insufficient to support a finding or due and regular execution of the note and mortgage."

Blood v. *La Serena Land and Water Co.,* 113 Cal. 221.

"Where it is shown that the seal attached to a note and mortgage executed by the president and secretary of a corporation in its name though not regularly adopted was employed as the seal of the corporation in all transactions requiring the impress of a seal, a finding is warranted that

it became the seal of the corporation by use; and the affixing of such seal to the note and mortgage makes a prima facie showing of authority to execute them; but such prima facie proof is overcome by proof that no resolution authorizing such execution was ever adopted by the board of directors of the corporation."

Blood v. *La Serena Land and Water Co.*, 113 Cal. 221.

No corporate seal was attached to the contracts in question.

"Under the Civil Code a ratification can only be made in the manner required in order to confer original authority for the act ratified; and a note and mortgage which could only be authorized by resolution of the board of directors can only be ratified by such resolution."

Id.

In the instant case there was no evidence offered showing a ratification of the agent's act.

"A complaint in an action to set aside a writing, purporting to be a contract for the sale of land belonging to the corporation defendant, which alleges that certain real estate agents, who signed the contract in behalf of the corporation, pretended they had authority from the corporation, by written resolution of its trustees, to contract for the sale of its lands, but that in fact they had no such authority, and which sets out the contract in *haec verba,* to which the corporate seal is not attached, states a cause of action, although it also alleges that the plaintiffs, before discovering the want of authority, paid a part of the purchase price, and that the corporation refused to return the amount paid upon demand of the plaintiffs, claiming the contract to be valid and binding, and had instituted suit against the plaintiffs to recover a balance due on the contract."

Salfield v. *The Sutter County Land Improvement and Reclamation Company,* 94 Cal. 546.

"The authority of an agent to contract for the sale of land must be in writing, and a corporation can confer authority upon an agent to sell its lands only through its board of directors, when duly assembled, by resolution duly passed and recorded, and a ratification of such authority can only be made in the same manner required for the conferring of original authority."

Id.

"The acts of the corporation in accepting money paid it under the terms of the agreement, and in commencing suit to recover money due by its terms, did not amount to a ratification of the contract."

Id.

"Neither the president or secretary of a corporation, nor any other person, has authority to execute a mortgage of the property of the corporation in the absence of a resolution of the board of directors passed when the board is duly assembled."

Alta Silver Mining Co. v. *Alta Placer Mining Co. et. al., Allen Towle et al.* 78 Cal. 629.

Counsel made the point that Jackson was the party to be charged and for that reason it was not necessary for the authority of the agent to be in writing. We submit that both parties to the contract were to be charged, and therefore, a written authorization was necessary.

The case of *Sellers* v. *Solway Land Con.* (afterwards Balfour, Guthrie & Co.) a California case reported in 160 Pacific Reporter 175, was one for recovery of commissions for the sale of land.

The contract which was set out in full in the

opinion was signed as follows:

"Balfour Guthrie & Co.
Per R. F. McLeod."

The Court said: "It is an established fact in the case and not disputed that the authority from the defendants to McLeod to enter into this contract was not conferred in writing. The action having been dismissed as to the defendant Solway Land Company the remaining defendant at the conclusion of the trial moved that the jury be directed to return a verdict in their favor upon the ground of the lack of written authority to McLeod; section 2309 of the Civil Code requiring that an authorization to an agent to enter into a contract required to be in writing must itself be evidenced by a written instrument. This motion was also granted, and the jury thereupon returned its verdict in favor of the defendants From the judgment entered thereon the plaintiff takes this appeal."

The judgment of the trial court was sustained.

The court will notice that the contract in the last case cited was signed as in the instant case, and it was held invalid because the authority of McLeod was not in writing as provided by Section 2309 of the Civil Code.

The case of *Vasik* v. *Speese*, a California case reported in 146 Pacific Reporter, page 61, was one for breach of contract as in this case. The following is the decision of the Appellate Court in that case:

"In this action the plaintiff seeks to recover damages for the breach of an alleged agreement of the respondent to lease to plaintiff certain real property for a period of five years. The damages are alleged to consist in the sum of $100 paid by the plaintiff at the time of making the agree-

ment, and in certain other sums expended and time lost by the plaintiff in preparing for performance of the contract by him.

"(1) The evidence shows that there was no written agreement or lease made or signed by the defendant, or by any person authorized in writing by the defendant to act for him. Under the rules declared in Sections 1624, 2309 and 2310 of the Civil Code, the alleged contract was invalid and not binding upon the defendant. There being no valid contract it follows,, of course, that there can be no damages for breach thereof."

The plaintiff in that case being dissatisfied with the judgment of the Appellate Court, applied for a rehearing which was denied, and a hearing before the Supreme Court was denied.

The above case was decided in 1914, and has the advantage of not being an ancient case. It is particularly pertinent as an authority for defendant in this action as the suit was for breach of contract.

A contract for the sale of real estate, or for the employment of a broker to sell real estate, must be in writing.

McRae v. *Ross*, 170 Cal. 74.

An authorization to an agent empowering him to make a contract on behalf of the principal to sell real estate or employ an agent to sell it, must be in writing. The principals is not estopped to deny the sufficiency of a parol authorization.

Id.

The authority of an agent to enter into a contract for his principal, which is required by law

to be in writing, can only be given by an instrument in writing.

Seymour v. *Theresa A. Oelrichs, et al.,* 156 Cal. 782.

A written contract by the husband, made by oral authority of the wife, to exchange the wife's separate property for other land, is void, as being unauthorized by law, under the statute of frauds.

Nason v. *Lingle,* 143 Cal, 363.

Sections 1624 and 2309 have their origin in the statute of frauds of 29 Charles 11, the provisions of which have been enacted in many of the statutes.

We are not unmindful of the fact that in a certain class of cases as between a corporation and its agents, and where value has been parted with the courts have held that the parties receiving the value are estopped to question the validity of the contract. That, however, is not the case here. The plaintiff parted with nothing. It was not dealing with its agent. It did attempt to get sixty dollars peaches for twenty-five dollars upon a contract signed by its agent without any written authorization and without any written ratification. The contract did not bear the seal of the corporation and it was not prima facie valid.

ERROR NUMBER FOUR.

The testimony upon which this assignment of error is based will be found in the transcript at page 116, and it relates to the introduction in evidence of the contract marked "Plaintiff's Ex-

hibit No. 6." The objection to the admission in evidence of this contract is set forth at page 116 of the transcript, and it embodies the same principles as were contained in the objection to the admission of "Plaintiff's Exhibit No. 5."

The court will note that the witness Laney, the superintendent of the Company, states at page 117 that at the time the contracts were signed he had no written authority to sign the same.

The same argument advanced by the plaintiff in error to the ruling of the trial court in admitting in evidence Contract No. 5 is applicable to the ruling in admitting Contract No. 6.

The land on which the peaches were grown, described in "Plaintiff's Exhibit No. 6," was situated at Bogue, and was the separate property of the wife of decedent, "(Defendant's Exhibit F.)" The deed under which this property was held was of record in the Recorder's office of Sutter County when the contract was made, and the defendant in error had had notice that the fruit to be grown thereon was not the property of Elmer B. Jackson.

Plaintiff in error also claims that the contracts, "Plaintiff's Exhibits No. 5 and No. 6," were void because the wife of Jackson did not join with him in executing the contracts.

As above stated the deed from Jackson to his wife ("Defendant's Exhibit F") under which she held the Bogue property, as her separate property, was admitted in evidence. There was also admitted in evidence a certified copy of a deed "(Defendant's Exhibit G)" showing the

conveyance to Elmer B. Jackson of the Oswald property. This property was acquired after the marriage of the parties and was community property. Mrs. Jackson states that she never authorized her husband to sign the contracts involved in this action, and that she did not know that her husband had signed the contracts (Trans. page 103.)

At the time the contract was written section 172 of the Civil Code read as follows:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto; and provided also, that no sale, conveyance or encumbrance of the f[illegible] furnishing and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife."

In 1917, the above section of the code was amended and it now reads as follows:

"The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration * *

"The husband has the management and con-

trol of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

Section 172a, Civil Code.

A valuable consideration, of course, means an adequate consideration. According to the testimony the market value of the peaches in 1918 was Sixty Dollars per ton and the contract price was twenty-five Dollars and Twenty-seven and 50/100 Dollars per ton, while during the year 1920 the market price was One Hundred and Ten Dollars per ton. These facts bring the contracts within the provisions of Section 172 of the Civil Code above quoted.

Until a crop is severed from the land it is a part of the realty under the law of this State.

"Real or immovable property consists of:

1. Land;

2. That which is affixed to land;

Section 658 Civil Code."

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs;"

Section 660 Civil Code.

It must necessarily follow then that a crop of peaches until harvested is a part of the land and it can not be conveyed except by the signature of both husband and wife if the property is community property.

While growing crops are chattels not susceptible of manual delivery until harvested, yet when harvested it is the duty of the purchaser to take immediate possession of the crop and to retain possession thereof.

O'Brien v. *Ballou,* 116 Cal. 318.

Plaintiff made no effort to take possession of the crop. If its contract had been good it could have enforced delivery had it elected so to do.

Under the sections of the Civil Code above recited the husband could not convey the title to the property without the signature of the wife, and aside from this fact the contract was unreasonable. If he could sell the crops for ten years in advance of producing them, he could sell them for twenty years, and if for twenty then for a hundred. In either case it would amount to restraint upon alienation. If he could sell for Twenty-five Dollars a ton, without his wife's consent, then he could have sold for a dollar a ton and by so doing deprived her of her share in the community.

Except in the single case mentioned in section

seven hundred seventy-two, the absolute power of alienation can not be suspended, by any limitation or condition whatever, for a longer period than as follows:

1. During the continuance of the lives of persons in being at the creation of the limitation or condition.

Section 715, Civil Code.

Counsel for defendant in error will probably cite many cases in which contracts of similar import and signed only by the husband have been upheld. In reply to such citations it will be necessary to say only that such contracts were made before the present provisions of Section 172 of the Civil Code were enacted, and for that reason such authorities are not in point here.

Under the provisions of the laws of California all property of a decedent vests in the heirs or devisees of such decedent on his death, subject, of course, to the possession of the same for administration purposes. There can be no possible delivery of property not in existence by a deceased person. The contracts in question do not purport to bind the heirs of parties to the contract.

The surviving wife of Jackson had a community interest in the property. The pretended contracts were made without her consent or knowledge. By the decision of the trial judge she was deprived of the sum represented by the judgment, exceeding the amount of $44,000.00, no matter what the price of peaches may be in future years. The plaintiff in error maintains that the

life of the contracts in question owing to their peculiar nature could not be extended beyond the death of deceased without her signature. Defendant in error advanced nothing on the contracts. It was not the loser of anything advanced by it as a consideration yet under the judgment if it is permitted to stand, the defendant in error simply folds its arms and makes a profit of thirty-five dollars per ton on the quantity of peaches that its witnesses stated would be the probable yield of the orchard during the years from 1919 to 1926 inclusive.

ERROR NUMBER FIVE.

The arguments presented herein under assignment of error Nos. One and Two applies with equal force to the objection made under the assignment and need not be again repeated.

ERROR NUMBER SIX.

The testimony which plaintiff in error endeavored to place before the court which was the subject of this assignment will be found at page 25 of the transcript and in the specifications of error above set forth. The Court will recall that the contracts were signed only about two months prior to the entry of the United States in the World War. It is a matter of common knowledge that the price of labor and materials in this State had increased to such an extent prior to the fruit harvest of 1918, that no orchardist could produce peaches under the then prevailing contract price of twenty-five dollars per ton, and owing to these conditions, and on to the demands of the Food Administration of the Government and the voluntary acts of those canneries having

long-term contracts, including the defendant in error in this case, the price of peaches to be delivered under such contracts was increased to an amount as high as $85 per ton. By the exclusion of this testimony plaintiff in error was not permitted to show these conditions.

ERROR NUMBER SEVEN.

The argument under assignment No. Six is applicable to this error as it relates to the same question.

ERRORS NUMBERS EIGHT AND NINE.

Plaintiff in error contends that there was no competent evidence received by the court at the trial of this action to sustain its finding No. 4. This finding is set forth at page 60 of the transcript and reads as follows:

"That on or about the 16th day of February, 1917, the said Elmer B. Jackson, together with one F. E. Laney, then and there acting as an alleged representative of plaintiff, entered into two certain agreements in writing, copies of which are set forth and annexed to the complaint of plaintiff herein, and marked Exhibits 'A' and 'B' respectively." Then follows copies of said exhibits which are the same as plaintiff's Exhibits 5 and 6 (Trans. pages 31 and 33) and are also the same as contained in the assignments of error, pages 61 and 63 of the Transcript.

The incompetency of the evidence upon which this finding was based has been fully discussed in the argument contained herein under "Error Number Three" and goes to the point that the corporation never authorized its agent, F. E.

Laney, to execute the contracts in question or that it ever ratified his act in that behalf as required by Sections 2309 and 1624 of the Civil Code of the State of California, and further that the said contracts were not competent as evidence because the wife of said Jackson did not sign them as required by the provisions of Section 172 of said Civil Code. Paragraph 5 of the contracts in question provide "It is mutually agreed between the parties hereto that the covenants herein contained shall go with the lands hereinabove described and shall bind both the parties hereto, their heirs, administrators, executors, successors and assigns."

It is clear that under the provisions of Section 172 of the Civil Code this provision is invalid, and that no delivery of peaches under the contract could be compelled without the signature of the wife.

Under the language above noted the covenants contained in the contract did not run with the land.

California Packing Corporation v. *Grove*, 190 Pac. Rep. 891.

In that case the provision of the contract was almost identical with the contracts under consideration here and the court in discussing it said "This provision does not constitute a covenant running with the land. Sections 1460-1462 Civil Code. Only those covenants that are made for the direct benefit of the property and are contained in a grant of the property run with the land. Sections 1460 and 1462, *supra; Long* v.

Cramer Meat and Packing Co., 155 Cal. 405, 101 Pac. 297. It is so clear that this is not a covenant running with the land that an extended examination of the point would be superfluous. It is quite true that parties may so word a contract that it will create a charge or lien upon land for the performance of a contract, and yet it may fall far short of creating a covenant running with the land. In this case the language used by the parties is not sufficient either to create a lien upon the land or to bind the assigns of the respondent Grove. The provision that the covenants shall run with the land does not effect that result."

In the case at bar delivery after the death of Jackson could not be enforced by the defendant in error.

THE JUDGMENT IS AGAINST LAW.

As a conclusion of law in this case the trial court found (Finding 1, Trans. 75): "That plaintiff was damaged by Elmer B. Jackson's breach of the two contracts mentioned in the findings and copies of which are attached to the complaint and marked Exhibit 'A' and Exhibit 'B' in the sum of forty-four thousand seven hundred and seven and 18/100 dollars ($44,707.18)

"That plaintiff's right to recover such damages accrued upon the filing of the suit herein September 27, 1918, and before the death of Elmer B. Jackson," and judgment was rendered in accordance with this conclusion (Trans. 76) Of the amount of this judgment over $40,000.00 was charged to the breach of the contract by Jackson on account of non-delivery of peaches for

the term of the contract remaining after his death embracing a period of eight years. This was in conflict with the laws of this State. Section 330 of the Civil Code provides: "No damage can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Cornell v. *Western Union, etc.*, 199 Pac. 1087

Westwater v. *Rector, Wardens, etc.*, 140 Cal 339..

Lane v. *Stooke*, 101 Pac. 937.

Owing to the nature of the contracts in question the damage for the breach was not ascertainable. It was remote and speculative. The very nature of the crops rendered them so. The question of what the orchards would produce in future years was dependent upon many questions which will suggest themselves to the Court. The question of the market value of the crops will also depend on many questions. Take last year for example: It is a matter of common knowledge that the market value of peaches of the kind mentioned in the contracts in the State of California was only thirty and thirty-five dollars per ton, and next year it may be twenty dollars per ton or less.

In view of these conditions it hardly seems just that defendant in error should make a profit of thirty-five dollars per ton as a result of a judgment where the damage was not clearly ascertainable.

The plaintiff in error respectfully submits that the judgment should be reversed.

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Copy of the within brief of Plaintiff in Error received this ..... day of February, A. D 1922.

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Attorneys for Defendant in Error